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## APPEALS, WEIGHT OF THE EVIDENCE.

## DEFENDANT'S CONVICTIONS FOR PREDATORY SEXUAL ASSAULT AGAINST A CHILD AND RAPE AFFIRMED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE DISSENT, APPLYING A WEIGHT OF THE EVIDENCE ANALYSIS, ARGUED THE EVIDENCE DID NOT RISE TO THE LEVEL OF BEYOND A REASONABLE DOUBT (FOURTH DEPT).

The Fourth Department, in an extensive, fact-specific decision, over a dissent, affirmed defendant's predatory sexual assault against a child and rape first degree convictions. The child was four when the alleged incident occurred and 11 at the time of the third trial. There was a hung jury in the first trial and the conviction after the second trial was reversed based upon the judge's handling of a jury note. The principal physical evidence was sperm found on the child's underwear. No semen was found on the underwear or on the child. There was no injury to the child's genitals. The defense theory was that the sperm was transferred to the child's underwear during a wash. The People's expert testified such a transfer was possible. The appeal came down to a weight of the evidence analysis. The dissent argued the proof did not rise to the level of beyond a reasonable doubt, noting the absence of semen, the lack of injury, the victim's poor memory and implausible description of the rape, the victim's affirmative response to the prosecutor's mistaken question about a second rape (the prosecutor mistakenly thought the two counts of rape in the indictment alleged two separate incidents), and the fact that defendant had no criminal record and no other allegation of inappropriate sexual conduct had ever been made against him. People v Garrow, 2019 NY Slip Op 03238, Fourth Dept 4-26-19

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## ATTORNEY GENERAL, AUTHORITY TO PROSECUTE.

## THE ATTORNEY GENERAL DID NOT HAVE THE AUTHORITY TO PROSECUTE DEFENDANT IN THIS CRIMINAL CASE BECAUSE NO REQUEST WAS MADE BY THE SUPERINTENDENT OF THE STATE POLICE (FOURTH DEPT).

The Fourth Department reversed defendant's weapons possession and sale convictions because the state Attorney General did not have the authority to prosecute the case. The Attorney General's authority to prosecute a criminal case is triggered when a request is made by the head of an appropriate agency, here the Superintendent of the State Police. No such request was in the stipulated record on appeal:

It is well settled that the Attorney General lacks general prosecutorial authority and has the power to prosecute only where specifically permitted by statute … . As relevant here, Executive Law § 63 (3) grants the Attorney General prosecutorial authority "[u]pon request of . . . the head of any . . . department, authority, division, or agency of the state" (emphasis added). Although the People assert that the Attorney General had authority to prosecute this matter under section 63 (3) based on a request made by the State Police, such a request would confer that authority only if made by the head of the division, i.e., the Superintendent of State Police … . Moreover, "the State bears the burden of showing that the [division or] agency head has asked for the prosecutorial participation of the Attorney General's office" … . People v Wassell, 2019 NY Slip Op 03187, Fourth Dept 4-26-19

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## ATTORNEYS, INEFFECTIVE ASSISTANCE, SPEEDY TRIAL.

## DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE HE MISCALCULATED AND FILED A SPEEDY TRIAL MOTION TEN DAYS BEFORE THE SPEEDY TRIAL CLOCK RAN OUT, DEFENDANT'S MOTION TO VACATE THE CONVICTION WAS PROPERLY GRANTED AND THE INDICTMENT DISMISSED (FIRST DEPT).

The First Department determined defense counsel was ineffective when he filed a speedy trial motion 10 days before the speedy trial clock would have run out. The indictment was dismissed in this CPL 440.10 proceeding:

Counsel filed a speedy trial motion, alleging well over the required threshold of 183 days of chargeable time. However, because of counsel's miscalculations, these allegations included substantial periods that were not in fact chargeable. As a result, the court deciding the speedy trial motion found that only 174 days were chargeable. However, if counsel had waited only 10 more days to file the motion, the circumstances of the case establish that this additional period would unquestionably have been charged to the People, as counsel was aware. Thus, the threshold would have been exceeded, and the court would have been required to grant the speedy trial motion. Instead, the filing of the premature motion stopped the clock and rendered the People's additional unreadiness excludable.

The CPL 440.10 hearing record establishes that counsel had no strategic reason for filing the speedy trial motion in the form and at the time he did, and that his handling of the motion was objectively unreasonable. Furthermore, the prejudice prong of a single-error ineffectiveness claim was satisfied, because "[i]t is well settled that a failure

of counsel to assert a meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" … . People v Stewart, 2019 NY Slip Op 03142, First Dept 4-25-19

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## CELL SITE LOCATION DATA, WARRANT REQUIREMENT.

## COURT ORDER AUTHORIZING ACCESS TO DEFENDANT'S HISTORICAL CELL SITE LOCATION DATA INCLUDED AN EXPRESS FINDING OF PROBABLE CAUSE AND WAS THEREFORE THE EQUIVALENT OF A WARRANT (SECOND DEPT).

The Second Department determined the court order authorizing access to defendant's historical cell site location data in this murder case was the equivalent of a warrant because it included an express finding of probable cause:

The defendant's contention that his historical cell site location information should have been suppressed as it was purportedly obtained in violation of his Fourth Amendment rights under Carpenter v United States (__ US __, 138 S Ct 2206 [2018]), is unpreserved for appellate review (see CPL 470.05[2]). In any event, the court order authorizing the acquisition of the records made an express finding of probable cause, which was supported by the People's evidentiary showing … . Accordingly, the order "was effectively a warrant" which complied with the requirement of Carpenter … . People v Clark, 2019 NY Slip Op 02719, Second Dept 4-10-19

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## DNA, WARRANT APPLICATION, ATTORNEYS.

## DEFENDANT AND DEFENSE COUNSEL ENTITLED TO NOTICE AND AN OPPORTUNITY TO BE HEARD IN OPPOSITION TO A WARRANT APPLICATION FOR THE COLLECTION OF DNA EVIDENCE, YOUTUBE VIDEO NOT PROPERLY AUTHENTICATED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that defendant was entitled to notice and an opportunity to be heard in opposition to a warrant application for the collection of DNA evidence. Defendant was incarcerated and represented on another matter at the time of the warrant application. The First Department also noted that a Youtube video admitted into evidence was not properly authenticated:

In general, search warrant applications are made ex parte … . However, as explained in Matter of Abe A. (56 NY2d 288 [1982]), special rules apply to evidence to be taken from a suspect's body, such as blood or DNA samples.

The hearing court excluded defense counsel based on its understanding that the discussion of notice in Abe A. applied only to the first "discrete level" of Fourth Amendment analysis identified in that case, involving "the seizure of the person necessary to bring him into contact with government agents," and not the second level, involving "the subsequent search and seizure for the evidence" (id. at 295 [internal quotation marks omitted]). …

Nothing in the Court's opinion suggests a basis for applying the "elementary tenet of due process" described by the [Abe A.] Court only to the first part of an application for an order to physically detain a person and then make a corporeal search. … Accordingly, defendant is entitled to suppression of the DNA evidence obtained as a result of the warrant issued by the hearing court, and a new trial … .

… [A]t trial the People failed to adequately authenticate an incriminating YouTube video under the standards set forth in People v Price (29 NY3d 472 [2017]), which was decided after defendant's trial. The authentication testimony was essentially limited to testimony that the video shown in court was the same as the one posted on YouTube and another website, and that defendant appears in the video. Accordingly, there was no authentication under any of the methods discussed in Price. People v Goldman, 2019 NY Slip Op 02976, First Dept 4-23-19

## DOUBLE JEOPARDY, SENTENCING, ATTORNEYS, INEFFECTIVE ASSISTANCE.

## DEFENDANT HAD SERVED HIS ENTIRE SENTENCE BY THE TIME THE ASSAULT SECOND CONVICTION WAS OVERTURNED, THE IMPOSITION OF MORE PRISON TIME UPON HIS SUBSEQUENT PLEA TO THE ASSAULT SECOND CHARGE VIOLATED THE DOUBLE JEOPARDY CLAUSE, DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING TIME SERVED, BECAUSE THE ERROR AFFECTED THE VOLUNTARINESS OF DEFENDANT'S GUILTY PLEA THE WAIVER OF APPEAL DID NOT APPLY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendant's motion to vacate his conviction and set aside the sentence should have been granted. The court noted that the waiver of appeal did not apply because the alleged error affected the voluntariness of the guilty plea. At the time defendant's assault second conviction was overturned he had completed his sentence. When he subsequently pled guilty to the assault second charge more prison time was imposed. That violated the prohibition against double jeopardy (punished twice for the same offense). Defense counsel was ineffective for not arguing defendant must be sentenced to time served:

At the time of remittal, it was clear that, more than 15 years earlier, defendant had been sentenced to seven years in prison for his conviction of assault in the second degree, which was the maximum permissible sentence for a second violent felony offender convicted of that crime … . It was also clear that his assault conviction had been overturned on appeal. These facts and circumstances alone would have alerted a reasonably competent attorney to the possibility that any subsequent sentence that included additional prison time might violate the constitutional prohibition against multiple punishments and, by extension, prompted an inquiry into the amount of time that defendant had already served in prison on his 2001 assault conviction. It is evident from the record that defense counsel did not recognize or investigate the obvious potential double jeopardy concern at the time of remittal for, if she had, she would have determined — as the People concede — that defendant had already served the maximum permissible prison term for assault in the second degree and, therefore, could be sentenced only to time served … . People v Jones, 2019 NY Slip Op 02586, Third Dept 4-4-19

## DOUBLE JEOPARDY, CONSPIRACY TO MURDER VS MANSLAUGHTER.

## PROSECUTION FOR CONSPIRACY TO MURDER AFTER MURDER TRIAL RESULTED IN MANSLAUGHTER AND GANG ASSAULT CONVICTIONS DID NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY (FIRST DEPT).

The First Department determined prosecuting defendant for conspiracy to commit murder, after a trial for the murder resulted in a conviction for manslaughter and gang assault, did not violate the prohibition against double jeopardy:

Defendant's prosecution for conspiracy to commit murder, after a prior prosecution for the actual murder resulted in a trial conviction for manslaughter and gang assault, did not violate the federal or state double jeopardy prohibitions, because conspiracy is not the same offense, for double jeopardy purposes, as murder, manslaughter, or gang assault … . "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not" (Blockburger v United States, 284 US 299, 304 [1932] [citations omitted]). Neither the fact that the evidence at the homicide trial would have also supported a conspiracy charge, nor the fact that defendant had been alleged to have acted in concert with other persons, has any relevance under the Blockburger test. People v Herrera, 2019 NY Slip Op 02631, First Dept 4-4-19

## EXCITED UTTERANCES.

## STATEMENT MADE BY THE ASSAULT VICTIM 12 TO 15 MINUTES AFTER THE ASSAULT WAS PROPERLY ADMITTED AS AN EXCITED UTTERANCE (FOURTH DEPT).

The Fourth Department determined a statement made by the victim of an assault 12 to 15 minutes after the assault was admissible under the excited utterance exception to the hearsay rule:

Defendant contends … that County Court erred in permitting a prosecution witness to testify that the victim told him that "the man he was fighting with was the one that cut him" because that statement did not fall under the excited utterance exception to the rule against hearsay. We reject that contention. The victim made the statement

approximately 12 to 15 minutes after the assault and while he was being treated in the prison's infirmary. Testimony at trial established that, at the time of the statement, the victim appeared to be "emotional," "mad," "angry," and "very agitated." The statement qualified as an excited utterance inasmuch as that statement was "made shortly after the [assault and] . . . while [the victim] was under the extraordinary stress of [his] injuries" … . People v Farrington, 2019 NY Slip Op 03237, Fourth Dept 4-26-19

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## EXCITED UTTERANCES, PRESENT SENSE IMPRESSION.

## 911 CALL PROPERLY ADMITTED AS PRESENT SENSE IMPRESSION OR EXCITED UTTERANCE, DEFENDANT PROPERLY GIVEN CONSECUTIVE SENTENCES FOR WOUNDING ONE VICTIM WITH THE INTENT TO SHOOT ANOTHER VICTIM (SECOND DEPT).

The Second Department determined a 911 recording was properly admitted under the present-sense-impression and excited-utterance exceptions to the hearsay rule and defendant was properly sentenced to consecutive sentences where, intending to shoot one victim, another victim was also hit:

We agree with the Supreme Court's determination allowing the admission of a recording of a call to the 911 emergency number made by the father of the then-15-year-old victim. The record established that the declarant made the call within seconds of the shooting after his son cried out that he had been shot, and the father saw his neighbor, who was also shot and who the father thought was dying, fall to the ground in a pool of blood. Although the declarant's statements to the 911 operator were hearsay, they were nevertheless admissible under the exception for excited utterances " made contemporaneously or immediately after a startling event'" … or present sense impressions made while he was "perceiving the event as it is unfolding or immediately afterward" which are "corroborated by independent evidence establishing [their] reliability" … . …

… [T]he defendant fired multiple shots with the intent of hitting the older victim and one of those shots hit the 15-year-old victim. However, "[t]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent" … . The shots which hit the two victims "were the result of separate and distinct acts of pulling a trigger to discharge a firearm" and "repetitive discrete acts, such as successive shots . . . [do not] somehow merge such that they lose their individual character where the same criminal intent . . . inspir[es] the whole transaction" … . Accordingly, the imposition of consecutive sentences for the two counts of attempted murder in the second degree was legal. People v Smith, 2019 NY Slip Op 02911, Second Dept 4-17-19

## FREEDOM OF INFORMATION LAW (FOIL) VICTIM'S MEDICAL RECORDS.

## MEDICAL RECORDS OF THE VICTIM OF SEXUAL ASSAULT SHOULD NOT HAVE BEEN MADE AVAILABLE TO THE PETITIONER, WHO WAS CONVICTED OF THE SEXUAL ASSAULT, PURSUANT TO PETITIONER'S FREEDOM OF INFORMATION LAW (FOIL) REQUEST, THE RECORDS ARE PROTECTED FROM DISCLOSURE BY THE PUBLIC HEALTH LAW, THE CIVIL RIGHTS LAW AND THE PUBLIC OFFICERS LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical records of the victim of sexual assault could not be disclosed to the petitioner, who was convicted of the sexual assault, pursuant to a Freedom of Information Law (FOIL) request. The medical records were protected from disclosure by the Public Health Law, the Civil Rights Law and the Public Officers Law:

"All government records are presumptively open for public inspection unless specifically exempt from disclosure" … . Public Officers Law § 87(2)(a) provides that an agency may deny access to records that are specifically exempted from disclosure by state or federal statute … . Here, the medical records of the victim sought by the petitioner are exempted from disclosure by Public Health Law §§ 2803-c(3)(f) and 2805-g(3) … . Also, the medical records are exempt from disclosure pursuant to Civil Rights Law § 50-b, which, with exceptions not relevant here, prevents any public officer from disclosing documents that would identify the victim of a sex offense … . Further, the records are exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(i) … . Matter of Crowe v Guccione, 2019 NY Slip Op 03044, Second Dept 4-24-19

## GUILTY PLEAS, DEPORTATION, JUDGES, ATTORNEYS.

## DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA AND DID NOT HAVE A PRACTICAL ABILITY TO OBJECT, THEREFORE AN EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL APPLIES, MATTER REMITTED TO ALLOW DEFENDANT TO MOVE TO WITHDRAW HIS PLEA (SECOND DEPT).

The Second Department determined the defendant was not informed of the deportation consequences of his guilty plea and therefore did not have the opportunity to move to withdraw his plea. Therefore a narrow exception to the preservation requirement applies and the matter was remitted to allow defendant to make the motion:

… [A] narrow exception to the preservation requirement exists "in rare cases where the defendant lacks a reasonable opportunity to object to a fundamental defect in the plea which is clear on the face of the record and to which the court's attention should have been instantly drawn,' such that the salutary purpose of the preservation rule is . . . not jeopardized'" … .

In this case, the exception applies. At the plea proceeding, the court merely asked defense counsel if he had discussed with the defendant the potential "immigration consequences" of pleading guilty. Defense counsel responded: "He is here on a Green Card. We have discussed the immigration consequences." Furthermore, the People's contention that the written appeal waiver form demonstrates that the defendant was aware of the possibility of deportation prior to the imposition of the sentence is without merit … . Inasmuch as the record does not demonstrate either that the Supreme Court mentioned, or that the defendant was otherwise aware of, the possibility of deportation, the defendant had "no practical ability" to object to the court's statement or to otherwise tell the court, if he chose, that he would not have pleaded guilty if he had known about the possibility of deportation … . People v Mohamed, 2019 NY Slip Op 02557, Second Dept 4-3-19

## GUILTY PLEAS, VIOLATION OF COOPERATION AGREEMENT.

## DEFENDANT'S REFUSING TO TESTIFY WAS DEEMED A VIOLATION OF THE WRITTEN COOPERATION AGREEMENT, HIS MOTION TO WITHDRAW HIS GUILTY PLEA WAS PROPERLY DENIED (CT APP).

The Court of Appeals, affirming the denial of defendant's motion to withdraw his guilty plea, over an extensive two-judge dissent, determined that defendant's refusal to testify against a person who had participated in a home invasion violated the written cooperation agreement:

As part of a plea agreement and in exchange for a favorable sentence, defendant entered into a written cooperation agreement whereby he promised to "cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney's Office, on all matters in which his cooperation is requested, including but not limited to the prosecution of [defendant's accomplices] on charges related to the murder of Jose Sanchez and the assault of [Sanchez's brother]." Prior to entering into the cooperation agreement, defendant had confessed to his involvement in the Sanchez murder and assault, explaining that the crimes were retaliation for a prior invasion of defendant's home by Sanchez and his associates, including Jose Marin. When defendant signed the agreement, he already had testified to Marin's involvement in the home invasion before the grand jury in the Sanchez matter, and he also had assisted the police with their investigation of the home invasion by identifying Marin in a photo array. …

… [D]defendant's refusal to testify against Marin violated the express terms of his cooperation agreement. The plain language of the agreement was objectively susceptible to but one interpretation … . County Court, therefore, did not abuse its discretion by denying defendant's motion to withdraw his guilty plea based on his claimed subjective misinterpretation of the agreement or by concluding, to the contrary, that defendant reasonably understood that his cooperation in the Marin prosecution was required … . People v Rodriguez, 2019 NY Slip Op 02444, CtApp 4-2-19

## IDENTIFICATION, POLICE OFFICER, GRAND JURY, VIDEO.

## DETECTIVE'S TESTIMONY IN THE GRAND JURY IDENTIFYING THE PERSON DEPICTED IN VIDEOTAPES AS THE DEFENDANT WAS ADMISSIBLE, COURT OFFERED NO OPINION WHETHER THE TESTIMONY WOULD BE ADMISSIBLE AT TRIAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined a police officer's testimony before the grand jury identifying the defendant in two videotapes was admissible. The court expressed no opinion whether the identification testimony would have usurped a jury's role at trial:

The court erroneously dismissed an indictment charging defendant with crimes committed in two incidents, both recorded in videotapes presented to the grand jury, on the ground that a police officer who witnessed neither incident, but knew defendant from the area, identified him in each videotape. This testimony was not impermissible and it did not render the grand jury proceedings defective. The detective testified from his personal knowledge. Moreover, unlike trial jurors who can normally observe a defendant in court, grand jurors do not have that means of making a comparison between a videotape and a defendant's appearance. In so holding, we express no opinion on the admissibility of a similar identification at trial. The "exceptional remedy of dismissal" … was not warranted. People v McKinney, 2019 NY Slip Op 02950, First Dept 4-18-19

## IDENTIFICATION, POLICE OFFICER, TRIAL, VIDEO.

## IT WAS (HARMLESS) ERROR TO ALLOW THE ARRESTING OFFICER TO TESTIFY THAT DEFENDANT WAS DEPICTED IN THE VIDEOTAPE WHICH WAS BEING PLAYED (FIRST DEPT).

The First Department determined it was (harmless) error to fail to sustain defense counsel's objection to the arresting officer's unprompted identification testimony that the defendant was depicted in the videotape that was being played:

The officer was not previously familiar with defendant, and there was no basis to conclude he was "more likely to correctly identify the defendant from the [videotape] than [was] the jury" … . However, this isolated instance

of apparent lay opinion was plainly harmless. After the overruled objection, the prosecutor immediately elicited that the officer could not "make out the face of the person" in the video whom he had said was defendant. The officer's testimony as a whole made clear that he did not claim to recognize defendant in the video, but that he was testifying about similarities between the appearance and distinctive clothing of the man in the video and that of defendant when he was arrested. People v Calderon, 2019 NY Slip Op 02468, First Dept 4-2-19

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## INDICTMENTS.

## WHERE THE INDICTMENT ALLEGES MORE THAN ONE WAY TO COMMIT THE CHARGED OFFENSE, THE PEOPLE NEED ONLY PROVE ONE (SECOND DEPT).

The Second Department noted that the People are not required to prove all of the ways the indictment alleged the crime was committed. The People need only prove one:

" Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others'"… . Therefore, where " the indictment charge[s] more than the People [are] required to prove under the statute,'" they are not required to prove that the defendant committed each of the charged acts … . Accordingly, the fact that the indictment charged the defendant with committing burglary in the third degree by both unlawfully entering and remaining in the subject premises did not require the People to prove both sets of facts and, since they proceeded only on the theory of unlawful entry, the Supreme Court properly instructed the jury on that theory only. People v Bynum. 2019 NY Slip Op 03067, Second dept 4-24-19

## JURY INSTRUCTIONS, INDICTMENTS, UNCHARGED THEORY.

## JURY INSTRUCTIONS ALLOWED DEFENDANT TO BE CONVICTED ON A THEORY THAT WAS NOT INCLUDED IN THE INDICTMENT, CONVICTION REVERSED IN THE INTEREST OF JUSTICE IN THIS ANIMAL CRUELTY CASE, NEW TRIAL ORDERED DESPITE DEFENDANT'S HAVING COMPLETED HIS SENTENCE (FIRST DEPT).

The First Department, reversing Supreme Court in the interest of justice, determined the jury instructions in this animal cruelty case allowed a conviction on a theory that was not included in the indictment. A new trial was ordered, despite defendant's having served his sentence:

As the People essentially concede, the court's jury charge constructively amended the indictment … . The indictment was limited to a theory that defendant personally mistreated his dog. However, the court read Agriculture & Markets Law § 353 to the jury almost in its entirety, including a provision that would allow the jury to convict defendant if he merely permitted another person to mistreat his dog. Unlike ordinary accessorial liability under Penal Law § 20.00, this theory of "permitting" is an entirely different way of committing the crime from personally mistreating the animal. This error was not harmless, because there was evidence from which a reasonable jury could have inferred that defendant took the blame for his dog's condition to cover for his uncle, who lived with defendant and made inconsistent statements about whether he witnessed defendant beating the dog.

However, the fact that defendant has completed his sentence does not warrant dismissal of the indictment. That approach is suitable only in cases of "relatively minor crimes" … , and this case involves "serious" allegations …of abusing an animal. Accordingly, we remand for a new trial. People v Gentles, 2019 NY Slip Op 02623, First Dept 4-4-19

## JURY INSTRUCTIONS, JUSTIFICATION DEFENSE.

## FAILURE TO TELL THE JURY TO STOP DELIBERATING IF THEY FIND THE JUSTIFICATION DEFENSE APPLIES REQUIRED REVERSAL, EVEN THOUGH THE JUDGE TOLD THE JURY TO ACQUIT ON ALL COUNTS IF THE JUSTIFICATION DEFENSE APPLIES (FIRST DEPT).

The First Department, reversing defendant's conviction, over a dissent, determined the judge's jury instruction did not make it clear that finding the defendant not guilty of assault first based upon the justification defense required that the jury stop deliberating. The judge had told the jury they must find the defendant not guilty "on all counts" if the justification defense applies:

… [R]eversal is warranted despite the lack of preservation, because, contrary to our dissenting colleague's contention, the court's charge, as a whole, failed to properly instruct the jury that if it found defendant not guilty of first-degree assault based on a finding of justification, the jury must not consider the lesser second-degree assault counts arising from defendant's use of force. The dissent posits that the instruction here is meaningfully different from Velez [People v Velez (131 AD3d 129)] in that the court "made it clear that a finding of not guilty on the basis of justification of the greater charge of assault in the first degree necessitated an acquittal on all counts." However, we have already considered and rejected the specific argument that it is proper or meaningfully different from Velez where a court employs the same language that the jury "must find the defendant not guilty on all counts" if it finds justification on the greater charge … . This language is not sufficient to convey to the jury the "stop deliberations" principle … . People v Wah, 2019 NY Slip Op 02973, First Dept 4-23-19

## JURY INSTRUCTIONS, ALLEN CHARGE.

## GIVING A SECOND ALLEN CHARGE AND ALLOWING THE JURY TO CONTINUE DELIBERATING TO 5 OR 6 PM ON A FRIDAY, KNOWING THAT THREE JURORS HAD TRAVEL PLANS FOR MONDAY, DID NOT CONSTITUTE COERCING THE VERDICT, PROVIDING BOTH WRITTEN AND ORAL JURY INSTRUCTIONS WAS NOT IMPROPER (FIRST DEPT).

The First Department, over an extensive two-justice dissent, determined (1) the trial judge's giving two Allen charges and allowing the jury to continue deliberations to 5 or 6 pm, at the jury's request, on a Friday, knowing that three jurors could not continue deliberating on Monday because of travel plans, did not constitute coercing a verdict, and (2) providing the jurors with both written and oral jury instructions, without objection, was not improper:

The substance of an Allen charge is not coercive if it is "appropriately balanced and inform[s] the jurors that they [do] not have to reach a verdict and that none of them should surrender a conscientiously held position in order to reach a unanimous verdict" … . Here, the trial court's repeated Allen charge included an instruction that the jurors were to "make every possible effort to arrive at a just verdict," thereby implicitly instructing the jurors that they were not required to reach a verdict if they did not all agree that the verdict was just. Further, the trial court advised the jury that it "was not asking any juror to violate his or her conscience or to abandon his or her best judgment." …

Defendant … contends that the trial court coerced the verdict by acceding to the request made in Court Exhibit XIII for more time to deliberate on the day of the verdict without immediately addressing the scheduling conflicts set forth in the same jury note in which the request was made. … As the record reflects, the trial court construed Court Exhibit XIII as meaning that the jurors thought that they could quickly resolve any remaining differences among them and agree upon a verdict within hours that same day, and therefore permitted them to do so. Thus, there was no need for the court to address the traveling plans of some jurors for the following week because this did not appear to be a problem at the time. People v Muhammad, 2019 NY Slip Op 02609, First Dept 4-4-19

## JURY SELECTION, FOR CAUSE CHALLENGE, APPEALS.

## FOR CAUSE JUROR CHALLENGES SHOULD HAVE BEEN GRANTED, JURORS COULD NOT UNEQUIVOCALLY STATE THEY COULD PUT ASIDE THEIR RESERVATIONS AND BE FAIR AND IMPARTIAL, BECAUSE THERE WILL BE A NEW TRIAL AND BECAUSE AN APPELLATE COURT CANNOT CONSIDER ISSUES NOT RULED UPON BY THE TRIAL COURT, THE TRIAL COURT WAS DIRECTED TO CONSIDER TWO EVIDENTIARY ISSUES, ONE RAISED BY THE PEOPLE, AND ONE RAISED BY THE DEFENSE (FOURTH DEPT).

The Fourth Department reversed defendant's conviction because for cause challenges to two jurors were denied. Neither juror gave unequivocal assurances that she could be fair and impartial, in fact one juror expressly said she would continue to think defendant was involved based solely on his presence in the courtroom. In the interest of judicial economy, because there will be a new trial, the Fourth Department indicated the court erred in finding defendant's cell phone was lawfully seized from defendant's vehicle incident to arrest to protect evidence in defendant's grabbable area from destruction or concealment. The Fourth Department noted it could not consider the People's argument the cell phone was lawfully seized pursuant to the automobile exception to the warrant requirement because Supreme Court didn't rule on that issue. The Fourth Department directed Supreme Court to make a ruling. The Fourth Department further directed Supreme Court to rule on whether an unavailable witness's hearsay statement should be admitted pursuant to defendant's rights to put on a defense and due process. Defendant had raised that issue but Supreme Court did not rule on it. With respect to the for cause juror challenges, the court wrote:

"It is well settled that a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial' "… . Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or talismanic' words . . . , [a prospective] juror[] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent [him or her] from reaching an impartial verdict" … . People v Clark, 2019 NY Slip Op 03231, Fourth Dept 4-26-19

## LESSER INCLUSORY COUNTS.

## UNAUTHORIZED USE OF A VEHICLE WAS A LESSER INCLUSORY CONCURRENT COUNT OF THE GRAND LARCENY COUNT, CONVICTION ON THE GRAND LARCENY COUNT REQUIRED DISMISSAL OF THE LESSER COUNT (FOURTH DEPT).

The Fourth Department dismissed the unauthorized use of a vehicle charge as a lesser inclusory concurrent count of the grand larceny charge, which was based upon car theft:

… "[B]ecause it is impossible to commit the crime of grand larceny in the fourth degree under Penal Law § 155.30 (8) without concomitantly committing the crime of unauthorized use of a vehicle in the third degree under section 165.05 (1)" … , we agree with defendant and the People that count three of the indictment, charging the latter crime, must be dismissed because it is a lesser inclusory concurrent count of count two, charging the former crime … . People v Hickey, 2019 NY Slip Op 03165, Fourth Dept 4-26-19

## OBSTRUCTION OF GOVERNMENTAL ADMINISTRATION.

## ANGRY REMARK MADE TO PROBATION OFFICER DID NOT CONSTITUTE OBSTRUCTION OF GOVERNMENTAL ADMINISTRATION, PROBATION SHOULD NOT HAVE BEEN REVOKED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's angry remark made to the probation officer (threatening to "blow her up") was not a crime and therefore did not justify the revocation of probation and incarceration (defendant has served his sentence):

A person is guilty of obstructing governmental administration in the second degree when "he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act" (Penal Law § 195.05). "The plain meaning of the statute and the accompanying commentary clearly demonstrate that the mens rea of this crime is an intent to

frustrate a public servant in the performance of a specific function" … . Although the evidence at the hearing demonstrated that the probation officer was at work, there was no evidence to show that the defendant attempted to prevent her from performing a specific function. The defendant's angry outburst, without more, was insufficient to establish a violation of Penal Law § 195.05. Thus, the Supreme Court's finding that the defendant violated a condition of his probation by failing to lead a law-abiding life is not supported by a preponderance of the evidence … . People v Brooks, 2019 NY Slip Op 02539, Second Dept 4-3-19

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## PAST RECOLLECTION RECORDED, RIGHT OF CONFRONTATION.

## THE POLICE-OFFICER WITNESS, WHO DID TESTIFY AT TRIAL, DID NOT REMEMBER THE INCIDENT WHICH WAS THE BASIS FOR THE CHARGES AGAINST DEFENDANT, HIS GRAND JURY TESTIMONY WAS PROPERLY ADMITTED AS PAST RECOLLECTION RECORDED, DEFENDANT'S RIGHT OF CONFRONTATION WAS NOT VIOLATED BECAUSE THE WITNESS TESTIFIED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive three-judge dissent, determined that the police-officer witness's grand jury testimony was properly admitted under the "past recollection recorded" exception to the hearsay rule. The grand jury testimony did not violate the Confrontation Clause because the officer, who could not remember the incident he described to the grand jury, did, in fact, testify at trial:

The foundational requirements for the admissibility of a past recollection recorded are: 1) the witness must have observed the matter recorded; 2) the recollection must have been fairly fresh at the time when it was recorded; 3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and 4) the witness must lack sufficient present recollection of the information recorded … . "When such a memorandum is admitted, it is not independent evidence of the facts contained therein, but is supplementary to the testimony of the witness. * * *

… [T]he right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact … . The Confrontation Clause is satisfied when these requirements are fulfilled — even if the witness's memory is faulty. The United States Supreme Court has directly addressed the situation where a

witness was unable to explain the basis for a prior out-of-court identification due to memory loss … . In Owens, the Court held that "[t]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" … . To that end, "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination), . . . the very fact that he has a bad memory" … . People v Tapia, 2019 NY Slip Op 02442, CtApp 4-2-19

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## SENTENCING, SENTENCE-PROMISE.

## COUNTY COURT COULD NOT LEGALLY FULFILL THE SENTENCING PROMISE THAT INDUCED DEFENDANT'S GUILTY PLEA, PLEA VACATED AND THE MATTER REMITTED FOR THE IMPOSITION OF A SENTENCE WHICH COMPORTS WITH DEFENDANT'S EXPECTATIONS (FOURTH DEPT).

The Fourth Department determined defendant's guilty plea was induced by a sentencing promise County Court could not fulfill. The plea was vacated and the matter was remitted for imposition of a sentence that comports with defendant's expectations:

Penal Law § 70.30 (3) provides that "the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." Penal Law § 70.30 (3) further provides that "[i]n the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court . . . , the credit shall also be applied against the minimum period." That credit, however, "shall not include any time that is credited against the term . . . of any previously imposed sentence . . . to which the person is subject" … . Thus, "a person is prohibited from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence' " … . Inasmuch as defendant was serving a sentence on a prior conviction throughout the instant proceedings, the court could not legally fulfill its promise to credit defendant's jail time against his sentence in this matter.

It is well established that "[a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored" … . "Where, as here, the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations" … . People v Mccullen, 2019 NY Slip Op 03180, Fourth Dept 4-26-19

## SEX OFFENDER REGISTRATION ACT (SORA).

## DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE BECAUSE THE VICTIM WAS NEARLY 17 AND NO FORCE WAS INVOLVED (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a downward departure under risk level guidelines:

Here, the Board recommended a downward departure on the ground set forth in the above guidelines. Significantly, the victim was to turn 17 only two months after the incident and reported that no force was used and that she was a willing participant. Moreover, the victim had various communications with defendant on Facebook and spent time with him prior to the incident, which appears to have been their only sexual encounter. Notably, County Court declined to grant a downward departure on the basis that defendant had already benefited from the victim's consent by obtaining a light criminal sentence. Clearly, this was not an appropriate factor to be considered under the guidelines. Therefore, under the circumstances presented, we find that defendant established by a preponderance of the evidence the existence of mitigating factors not taken into account by the guidelines and that County Court abused its discretion in denying his request for a downward departure … . Consequently, defendant's total risk score of 90, which presumptively placed him in the risk level two classification, should be reduced by the 25 points allocable to risk factor 2 (sexual contact with victim), giving him a total risk score of 65 and placing him in the risk level one classification. People v Secor, 2019 NY Slip Op 02759, Third Dept 4-11-19

## SPEEDY TRIAL.

## POST READINESS DELAY BECAUSE A PROSECUTION WITNESS WAS ON VACATION WAS CHARGEABLE TO THE PEOPLE, DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined a period of postreadiness delay because a prosecution witness was on vacation was chargeable to the People and the defendant's speedy trial motion should have been granted:

It is well established that "[t]he unavailability of a prosecution witness may be a sufficient justification for delay . .. , provided that the People attempted with due diligence to make the witness available" … . Additionally, the reason for the witness's unavailability is relevant to determining whether a delay is justified. Where a witness is unavailable because of medical reasons or military deployment, courts generally have held that the delay is not chargeable to the People … . Where the witness is unavailable because he or she has taken a vacation, however, many courts have charged the time to the People … . That is because "the mere fact that a necessary witness plans to go on a vacation does not relieve [the People] of their speedy trial obligation" … . Here, the People did not establish that they exercised due diligence to secure the witness's presence on the scheduled trial date, and we conclude that the delay arising from the witness's unavailability during his vacation is chargeable to the People. People v Harrison, 2019 NY Slip Op 03173, Fourth Dept 4-26-19

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## STATEMENTS, ADMISSION TO POLICE AGENT.

## ALTHOUGH THE PRIVATE CITIZEN WAS ACTING AS AN AGENT FOR THE POLICE WHEN SHE RECORDED DEFENDANT'S ADMISSION TO MURDER, DEFENDANT WAS NOT ENTITLED TO A 710.30 NOTICE BECAUSE THE STATEMENT WAS VOLUNTARILY MADE AND NOT SUBJECT TO SUPPRESSION, TWO -JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that the failure to provide a CPL 710.30 notice of a statement made by defendant to a private citizen was a mere irregularity, not reversible error, because the statement was not involuntarily made, and therefore was not subject to suppression. The two dissenters argued that it was possible the defendant was induced to make the statement by the promise of sexual relations with the private citizen. Because there was a colorable basis for suppression, the dissenters argued, the defendant was entitled to notice and a hearing. In the recorded statement the defendant admitted to committing murder and explained the details. The decision is extensive and addresses several other substantive issues: (1) Defendant was not entitled to Miranda warnings because he was not subjected to custodial interrogation in that he was incarcerated on another matter when he was questioned and no added constraints were imposed; (2) The prosecutor provided race-neutral explanations for challenges to jurors—one juror's father and brother had criminal convictions—another juror acknowledged reading books by a writer with anti-police and anti-establishment views; (3) The testimony by a medical examiner who did not conduct the autopsy did not violate defendant's right of confrontation; and (4) The defendant's request for an accomplice jury instruction was

properly denied because there was no question whether the witness participated in the offense. With respect to the statement recorded by a private citizen for which no 710.30 notice was provided, the court wrote:

… [W]e agree with our dissenting colleagues that the citizen in this case was acting as a police agent at the time she recorded the statements inasmuch as she was acting "at the instigation of the police . . . to further a police objective" … .

We respectfully disagree with our dissenting colleagues, however, on the issue whether the failure to provide the CPL 710.30 notice warrants preclusion of those statements. We conclude that it does not. Where, as here, there is "no colorable basis for suppression of the statement, the failure to give notice [constitutes] a mere irregularity not warranting preclusion" … . In our view, there is no colorable basis for suppression of defendant's statements to the private citizen. There is no dispute that defendant voluntarily went to the citizen's home and that he was interested in pursuing a romantic relationship with her. During the entire conversation, wherein defendant admitted committing the homicide, the private citizen made no explicit or implicit promises that she would engage in sexual relations with defendant. Rather, it was defendant who offered to tell her anything she wanted to know after she expressed that she was afraid of him, and then provided her with all of the details concerning the homicide. We thus conclude that the private citizen did not make any statement or engage in any conduct that "create[d] a substantial risk that . . . defendant might falsely incriminate himself"… . People v Albert, 2019 NY Slip Op 03227, Fourth Dept 4-26-19

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## STATEMENTS, MIRANDA, ATTORNEYS.

## STATEMENTS MADE AFTER DEFENDANT REQUESTED AN ATTORNEY SHOULD HAVE BEEN SUPPRESSED, ERROR WAS NOT HARMLESS (FOURTH DEPT).

The Fourth Department, reversing County Court, determined that defendant's statements, made after he had asked for an attorney, should have been suppressed. The court further disagreed with the People's argument that the error was harmless:

We agree with defendant, however, that County Court … erred in denying that part of his omnibus motion seeking to suppress the statements that he made while at the police station after he unequivocally asserted his right to counsel by asking, "May I have an attorney please, a lawyer?" Specifically, we conclude that the court erred in refusing to suppress the statements that defendant made to investigators during his videotaped

interrogation … after requesting an attorney and the statements that defendant made on the videotape after the investigators left the interview room … .

We further conclude that, contrary to the People's assertion, the court's error is not harmless inasmuch as there is a "reasonable possibility that the error might have contributed to defendant's conviction" … . The defense theory at trial was that defendant had consensual sexual contact with the victim. During the videotaped interrogation viewed by the jury, however, defendant repeatedly denied having had any sexual contact with the victim. He then admitted that he had lied, but nevertheless continued to deny that sexual contact had occurred. In addition, the prosecutor, on redirect examination of one of the investigators, elicited testimony establishing that, after the investigators left the room, defendant was recorded making an additional comment that contradicted his earlier statements. People v Jackson, 2019 NY Slip Op 03162, Fourth Dept 4-26-19

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## STREET STOPS, DE BOUR, APPEALS.

## THE CONSEQUENCES OF DEFENDANT'S WAIVER OF APPEAL WERE EITHER NOT EXPLAINED OR WERE WRONGLY EXPLAINED, THE WAIVER WAS INVALID, THE INITIAL COMMUNICATION BY THE POLICE OFFICER WAS NOT A LEVEL ONE DE BOUR INQUIRY, THE SWITCHBLADE DEFENDANT THREW AWAY WHEN THE COMMUNICATION WAS MADE WAS PROPERLY ADMITTED IN EVIDENCE (SECOND DEPT).

The Second Department determined (1) defendant's waiver of appeal was invalid because the nature and consequences of the waiver were either not explained or were wrongly explained, and (2) the police officer's (Conaghan's) initial communication with defendant when the officer was sitting in a moving police vehicle was not a level one De Bour inquiry. Therefore the switchblade defendant threw away upon the officer's communication was properly admitted in evidence:

We agree with the Supreme Court's determination that the comment, "fellas, how you doing tonight," constituted a greeting and not a level-one De Bour inquiry … . Conaghan testified at the suppression hearing that, when he asked the defendant and the two other males how they were doing, the window to the vehicle was already rolled down and his partner did not stop the vehicle. He also testified that he often greeted people on the street in this manner. Moreover, the credibility determinations of a court following a suppression hearing are entitled to great

deference on appeal and will not be disturbed unless clearly unsupported by the record … . A review of the record supports the court's finding that Conaghan's testimony was credible.

Since there was no impermissible request for information by Conaghan, the defendant's "unprovoked and wholly voluntary" act of throwing the switchblade was not in direct and immediate response to any illegal actions by the police … . The recovery of the switchblade was not tainted by any illegality, because no illegal inquiry occurred … . People v Birch, 2019 NY Slip Op 02716, Second Dept 4-10-19

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## STREET STOPS, SEARCHES, COMPETENCY.

## DEFENDANT WAS HANDCUFFED WHEN THE POLICE SEARCHED A BAG ON THE FLOOR NEAR HIM, THE KNIFE IN THE BAG SHOULD HAVE BEEN SUPPRESSED, JUDGE PROPERLY PROCEEDED TO TRIAL WITHOUT A COMPETENCY EXAM ORDERED BY ANOTHER JUDGE AFTER DEFENDANT REFUSED TO BE EXAMINED (FIRST DEPT).

The First Department determined the warrantless search of a bag next to defendant was not justified as a search of the "grabbable" area because defendant was handcuffed. Admitting the knife in evidence was harmless error, however. Another judge had ordered a sixth CPL article 730 competency exam, but, after the defendant refused to be examined, the trial judge properly commenced the trial without the ordered examination. The defendant had a long history of psychiatric problems, but the most recent exam deemed him competent:

In the circumstances presented, the court did not err when it determined that defendant's trial would commence notwithstanding that a different judge had ordered a sixth CPL article 730 examination, which had not yet been conducted because the defendant refused to be examined … . The court acted within its discretion to decline to repeatedly issue force orders to compel defendant's submission to the extant competency examination order. Furthermore, the court considered the long history of examinations in this case and its own observations of defendant over its prolonged history. We find nothing in People v Armlin (37 NY2d 167 [1975]) that prohibits a court from considering changed or extraordinary circumstances in denying a previously granted examination, particularly given defendant's profound lack of cooperation and a recent examination finding him competent.

We find that the trial court should have suppressed the 12 inch knife recovered by the police during a warrantless search of defendant's bag. Although at the time of the search the bag was on the floor within the "grabbable area" next to defendant, he was standing with his arms handcuffed behind his back … . These circumstances do

not support a reasonable belief that the defendant could have either gained possession of a weapon or destroyed evidence located in the bag. Police did not show any exigency to justify the warrantless search of the bag … . People v Washington, 2019 NY Slip Op 02610, First Dept 4-4-19

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## STREET STOPS, DE BOUR, ANONYMOUS TIP.

## ALTHOUGH THE POLICE RECEIVED AN ANONYMOUS TIP THAT A MAN MATCHING DEFENDANT'S DESCRIPTION HAD A GUN, THE POLICE SAW NO SIGN OF CRIMINAL ACTIVITY WHEN THEY APPROACHED AND QUESTIONED THE DEFENDANT, THE SUBSEQUENT SEIZURE AND FRISK OF THE DEFENDANT WAS ILLEGAL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing defendant's conviction, determined the police illegally seized and frisked the defendant when they had only a level two right to inquire. The police were given an anonymous tip that a black man in a bodega wearing a black coat with a fur hood had a gun. The defendant matched the description, but he was seized and frisked in the absence of any sign of criminal activity. The fact that the anonymous tip tended to identify a specific person was not enough to justify the seizure. The handgun should have been suppressed:

The police may not stop and frisk a person based solely on information furnished by an anonymous source that the person is carrying a gun … . Since an anonymous tip "seldom demonstrates the informant's basis of knowledge or veracity," it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability … . The tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person" ... . …

One of the officers asked defendant if everything was okay, and he replied in the affirmative. Defendant then attempted to pass by the officers and exit the store. He was prevented from exiting when one of the officers "sidestepped to [his] right," in order to "prevent [defendant] from leaving the store." The officer testified at the hearing that they "decided to frisk [defendant] for [their] safety, since it came over as male with a firearm and he fit the description." They walked defendant to the counter, which was 5 to 10 feet away. Defendant put his hands on the counter, and the officers proceeded to frisk him. The officer testified that defendant placed his hand inside his jacket pocket, whereupon he used force to pull defendant's wrist from the pocket. The officer testified that when he grabbed defendant's wrist a silver firearm fell to the ground.

The People argue that defendant's action in putting his hand in his pocket gave rise to reasonable suspicion. The problem with this argument is that defendant was already seized prior to this point. People v Brown, 2019 NY Slip Op 03305, First Dept 4-30-19

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## STREET STOPS, DE BOUR, ANONYMOUS TIP.

## ANONYMOUS TIP ALLEGING SUSPICIOUS BEHAVIOR BY MEN WEARING HOODIES GOING IN AND OUT OF A U-HAUL TRUCK DID NOT JUSTIFY PULLING OVER A U-HAUL TRUCK DRIVEN BY A MAN WEARING A HOODIE, WEAPON FOUND IN THE TRUCK SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that the anonymous tip that persons were acting suspicious going in and out of a U-Haul truck and that one of the persons was wearing a brown hoodie did not justify pulling over a U-Haul truck driven by a man wearing a brown hoodie. The weapon found in the truck after the traffic stop should have been suppressed:

… [T]he police lacked reasonable suspicion to stop the vehicle based only on the anonymous tip of men "suspiciously" going in and out of a U-Haul truck, because the tip was insufficient to create reasonable suspicion that the individuals described were engaging in criminal activity … . The characteristics described in the anonymous tip were readily observable, and the behavior of the individuals described in the tip was consistent with the ordinary use of a U-Haul truck, as the tipster failed to identify what made the behavior suspicious for burglary … . Additionally, the tip "lacked predictive information" and was uncorroborated by the officers, as the U-Haul truck was not at the reported location when the officers arrived … . Accordingly, the information that the police received from the anonymous informant, even coupled with the officers' own observations, did not provide them with reasonable suspicion to make an investigatory stop … . People v Floyd, 2019 NY Slip Op 02546, Second Dept 4-3-19

## STREET STOPS, DE BOUR, BLOCKING VEHICLE, SEIZURE.

## POLICE EFFECTIVELY SEIZED DEFENDANT BY BLOCKING DEFENDANT'S VEHICLE WITH TWO POLICE CARS, BECAUSE THE SEIZURE TOOK PLACE IN THE ABSENCE OF REASONABLE SUSPICION A PARTICULAR PERSON WAS INVOLVED IN A CRIME THE TANGIBLE EVIDENCE SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and suppressing the tangible evidence, determined the police effectively seized defendant by blocking in defendant's vehicle with two police cars without sufficient cause:

The conviction arises from a police encounter during which an officer approached the parked vehicle in which defendant was a passenger and observed that defendant was in possession of a handgun. We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure of the vehicle, and thus Supreme Court erred in refusing to suppress both the tangible property seized, i.e., the weapon, and statements defendant made to the police at the time of his arrest. Here, police officers effectively seized the vehicle in which defendant was riding when their two patrol cars entered the parking lot in such a manner as to prevent the vehicle from being driven away … . The police had, at most, a "founded suspicion that criminal activity [was] afoot," which permitted them to approach the vehicle and make a common-law inquiry of its occupants. They did not, however, have "reasonable suspicion that [a] particular individual was involved in a felony or misdemeanor" to justify the seizure that occurred here …, and thus the weapon and defendant's statements should have been suppressed. People v Suttles, 2019 NY Slip Op 03158, Fourth Dept 4-26-19

## SUPERIOR COURT INFORMATION.

## SUPERIOR COURT INFORMATION DID NOT INCLUDE THE APPROXIMATE TIME OF THE OFFENSE, GUILTY PLEA VACATED (THIRD DEPT).

The Third Department, reversing County Court, determined the superior court information (SCI) to which defendant pled guilty was invalid because it did not include the approximate time of the offense. The guilty plea was vacated:

Defendant contends that the waiver of indictment was deficient, requiring that the guilty plea be vacated, because there was not strict compliance with the statutory mandates of CPL 195.20. Specifically, defendant asserts that the superior court information (hereinafter SCI) does not set forth the "approximate time" of the offense nor does the record establish that the waiver of indictment was signed by defendant in open court … . With regard to the approximate time of the offense, such information, which is required by the plain language of the statute, was omitted from the SCI . Furthermore, this is not "a situation where the time of the offense is unknown or, perhaps, unknowable" so as to excuse the absence… of such information … . As we have previously noted, "[a]ny other interpretation would render the statute's language requiring the 'approximate time' superfluous or redundant" … . Inasmuch as defendant's waiver of indictment was not procured in strict compliance with the statutory provisions, it is invalid, thereby requiring vacatur of his guilty plea and dismissal of the SCI … . People v Edwards, 2019 NY Slip Op 03108, Third Dept 4-25-19

## WAIVER OF INDICTMENT, SUPERIOR COURT INFORMATION.

## WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION DID NOT INCLUDE THE TIME OF THE OFFENSE, GUILTY PLEA VACATED (THIRD DEPT).

The Third Department, reversing County Court, determined that defendant's guilty plea must be vacated because the waiver of indictment and superior court information were defective. The time of the offense was not indicated:

We agree with defendant's contention that, because there was not strict compliance with the statutory mandates of CPL 195.20, his waiver of indictment is invalid, thereby requiring reversal of the judgment of conviction … . The plain language of CPL 195.20 requires that a waiver of indictment include the date and approximate time

of the charged offense. Although the waiver of indictment and the SCI, when filed together, may be read as a single document in order to satisfy the requirements of the statute, here, neither the waiver of indictment nor the SCI properly indicate the time of the charged offense … . Moreover, this is not "a situation where the time of the offense is unknown or, perhaps, unknowable" so as to excuse the absence of such information … . People v Titus, 2019 NY Slip Op 02588, Second Dept 4-4-19

Because defendant's admission to a violation of probation was induced by the explicit promise his sentence for the probation violation would run concurrently with the sentence for attempted burglary, which was reversed above, defendant's plea to the probation violation was vacated as well. People v Titus, 2019 NY Slip Op 02589, Third Dept 4-4-19

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## YOUTHFUL OFFENDER ADJUDICATION, REFUSAL TO ANSWER QUESTIONS REGARDING.

## A PERSON ADJUDICATED A YOUTHFUL OFFENDER CAN REFUSE TO ANSWER QUESTIONS ABOUT THE CHARGES, THE POLICE INVESTIGATION, THE PLEA AND THE ADJUDICATION, BUT CANNOT REFUSE TO ANSWER QUESTIONS ABOUT THE UNDERLYING FACTS (SECOND DEPT).

The Second Department determined defendant's youthful offender adjudication allows defendant to refuse to answer questions about the charges, the police investigation, whether she pled guilty and whether a youthful offender adjudication was made, but defendant cannot refuse to answer questions about the facts underlying the adjudication. Here plaintiff sued defendant for personal injuries stemming from a fight with defendant, which was the basis for the youthful offender adjudication:

"[A] person adjudicated a youthful offender may refuse to answer questions regarding the charges and police investigation, whether he or she pleaded guilty, and whether a youthful offender adjudication was made" … . However, "not all of the information contained within the protected records is necessarily privileged" … . The statutory grant of confidentiality afforded to official records and the information contained therein does not extend to the facts underlying the incident which gave rise to the youthful offender adjudication (see CPL 720.35[2]). Thus, an eligible youth may not refuse, on grounds of confidentiality, to answer questions about the facts underlying the subject incident, even though those facts also form the basis of his or her youthful offender adjudication … . Arma v East Islip Union Free Sch. Dist., 2019 NY Slip Op 03019, Second Dept 4-24-19

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